No. 03-13

(14)

Supreme Court, U.S.
FILED
DEC 19 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE REPUBLIC OF AUSTRIA
and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF MICHAEL BERENBAUM, JUDY CHICAGO AND DONALD WOODMAN, HEDY EPSTEIN, HECTOR FELICIANO, PETER HARCLERODE, DEBORAH E. LIPSTADT, FRANKLIN H. LITTELL, MARCIA SACHS LITTELL, HUBERT G. LOCKE, BRUCE F. PAULEY, BRENDAN PITTAWAY, CAROL RITTNER, AND JOHN K. ROTH, IN SUPPORT OF THE RESPONDENT

ARTHUR MILLER
Areeda Hall 228
1545 Massachusetts Ave.
Cambridge, MA 02138
617-495-4111

MELVYN WEISS, ESQ.
MILBERG WEISS BERSHAD
HYNES & LERACH, LLP
One Pennsylvania Plaza
New York, NY 10119-0165
212-594-5300

EDWARD MCGLYNN GAFFNEY, JR.*
VALPARAISO UNIVERSITY
SCHOOL OF LAW
656 S. Greenwich Street
Valparaiso, IN 46383
219-465-7860
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Jurisdiction over Restitution of Nazi-Looted Art Should Be Evaluated within the Broad Context of the Nazi Atrocities and of the Extortion and Deception Practiced by the Austrian Government after World War II..... 4

A. Historical Misstatements and Lacunae in the Statement of the Case..... 4

B. The Lexicon of Crime Was Reinvented in the Mid-Twentieth Century to Describe the Enormity of State-Sanctioned Moral Depravity..... 9

C. The Looting of the Altmann's Property Must Be Evaluated within the Specific Context of Austrian Antisemitism and the Significant Participation of Austrians in the Mass Murder of Jews during the Nazi Era 13

II. Federal Courts Have Plenary Jurisdiction over the Crime of Genocide and its Fruits..... 17

III. Austria's Claim to Absolute Sovereign Immunity Must Be Evaluated with the Matrix of Critical Historical Developments in the Twentieth Century..... 19

A. Treaty Obligations as a Limit Upon Sovereign Immunity..... 19

TABLE OF CONTENTS – Continued

Page

B. The Claim of Austria to an Expectation of Absolute Sovereign Immunity is Negated by International Covenants to which Austria is a Party, by Austria's Theory and Practice Relating to Sovereign Immunity, by the State Treaty of 1955 under which it Reentered the Family of Nations in 1955, and by Recent Legislation 20

IV. Jurisprudential Reasons for Affirming the Court of Appeals 23

A. This Court Should not Employ Formalistic Legal Reasoning that Masks the Worst Crime of the Twentieth Century 23

B. Affirming the Court of Appeals Would Have no Negative Impact on Foreign Relations 26

C. Affirming the Court of Appeals is an Honorable Way of Bearing the Burden of Memory of the Shoah 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Brown v. Bd. of Education, 347 U.S. 483 (1954) 29

Church of the Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 29

Dralle v. Republic of Czechoslovakia, 17 I.L.R. 155 (Supreme Court of Austria 1950) 22

McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980) 9

The Amistad, 40 U.S. 518 (1841) 17-18

United States v. Portrait of Wally, 105 F. Supp. 2d 288 (S.D.N.Y. 2000) 8, 18

CONSTITUTIONS

Austrian Const. Art. 9 (1) 20

MISCELLANEOUS

3 *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg, 1947) 16, 20, 28

American Association of Museum Directors, *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945)* 23

Peter Balakian, *The Burning Tigris: The Armenian Genocide and America's Response* (2003) 2

Avraham Barkai, "Arisierung," in Israel Gutman, ed., 1 *Encyclopedia of the Holocaust* (1990) 7

Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003) 7, 8, 9

TABLE OF AUTHORITIES – Continued

Page

Michael Berenbaum, *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (1990).....13

Central Registry of Information on Looted Cultural Property, 1933-1945, http://www.lootedart.com/.....24

Robert E. Conot, *Justice at Nuremberg* (1983).....10, 11

Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (2003).....24

Emil Fackenheim, "On Jewish Values," *Judaism* (March 1967).....13

Hector Feliciano, *Lost Museum* (1997).....7

Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control of 1943, 8 Dept. St. Bull. 1943.....7

Martin Gilbert, *The Holocaust: A History of the Jews of Europe in the Second World War* (1985).....11, 14

Lawrence Kaye, "Laws in Force at the Dawn of World War II: International Conventions and National Laws," in Elizabeth Simpson, ed., *The Spoils of War: World War II and its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property* (1997).....7

Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910).....22

Raphael Lemkin, *Axis Rule in Occupied Europe* (1944).....11, 12

TABLE OF AUTHORITIES – Continued

Page

Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (1994).....27

Bruce F. Pauley, "Austria," in Davis S. Wyman, ed., *The World Reacts to the Holocaust* (1996).....13

James S. Plaut, "Loot for the Master Race," *Atlantic Monthly* (Sept. 1946).....25

James S. Plaut, "Hitler's Capital," *Atlantic Monthly* (Oct. 1946).....25

Herbert Rosenkranz, "Austria," Israel Gutman, ed., 1 *Encyclopedia of the Holocaust*, (1990).....14, 15

The Federalist Nos. 10, 51.....26

Washington Conference on Holocaust-Era Assets (1998) http://fcit.usf.edu/holocaust/resource/assets/heac4.pdf.....8

Elie Wiesel, "Foreword," in Stuart Eizenstat, *Imperfect Justice* (2003).....30

Geri Yonover, "The Return of Nazi-Looted Art: Choice of Law Issues," in John K. Roth, ed., 2 *Remembering for the Future: The Holocaust in the Age of Genocides* (2001).....22, 23

Brief Amicus Curiae of Michael Berenbaum, Judy Chicago and Donald Woodman, Hedy Epstein, Hector Feliciano, Peter Harclerode, Deborah E. Lipstadt, Franklin H. Littell, Marcia Sachs Littell, Hubert G. Locke, Bruce F. Pauley, Brendan Pittaway, Carol Rittner, and John K. Roth, in Support of the Respondent

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are scholars of the history of the Shoah, or of the history of modern Germany and Austria, or of art history in the period relevant to this case.[1] Particular statements about each amicus are included in Appendix A. Amici are intimately familiar with the events that form the broad background to issues presented in this case and other cases involving Nazi-looted art that may be affected by the Court's ruling in this case.

Amici have a keen interest in rigorous honesty in assessing the meaning of the Shoah and its relevance to the contemporary world. This interest impels the amici to challenge any claim of absolute sovereign immunity by any nation that would seek to profit improperly from the dispossession of victims of racial or religious discrimination by nation states in violation of international law. Hence they have a strong interest in preventing any nation, including our own, from benefiting from ongoing possession of Nazi-looted art.

All of the amici are engaged in one way or another in education about genocide, and in particular about the

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties. The consent letters have been lodged with the Clerk of the Court.

Holocaust. They have a strong interest in preserving the memory of the Shoah. Two phrases encapsulate this interest: "Never Forget" and "Never Again." The trivialization of the Shoah or, worse yet, its elision or outright denial, leads to further atrocities. When Hitler undertook the invasion of Poland in 1939, he reminded his generals that "nobody remembers the Armenians," who had been subjected to mass deportation and murder in the second decade of the last century. *See, e.g.*, Peter Balakian, *The Burning Tigris: The Armenian Genocide and America's Response* (2003). We dare not fail to remember the Shoah.

SUMMARY OF ARGUMENT

When facts are as deplorable as those described in careful findings by the District Court and by the Court of Appeals – plunder of the property of Jews by the Nazis in the late 1930s, extortion practiced by Austrian officials shortly after the war to induce the surrender of valuable property rights by traumatized and penniless survivors of the Shoah, and ongoing deception of the victims perpetrated by Austria that came to light only when the Austrian Gallery's archives were opened in 1998 – it is unsurprising that counsel would argue a legal point that would impede our courts from reaching the merits of the plaintiff's claim. The legal theory advanced by the petitioners is that Austria and its instrumentality, the Austrian Gallery, enjoy absolute sovereign immunity, even in a case seeking restitution of Nazi-looted art to its rightful owners.

In this brief amici provide the Court with crucial historical background information with which to assess petitioners' misplaced reliance upon absolute sovereign immunity. Section I situates the alleged theft of these paintings within the larger context of the crime of genocide perpetrated by German and Austrian Nazis. The very language of crime had to be reinvented to describe the enormity of state-sanctioned moral depravity in the

twentieth century. The term "genocide" was invented in 1944 to describe what Winston Churchill referred to as "a crime without a name." A year later the Treaty of London addressed two distinct crimes – war crimes and crimes against humanity – that guided the International Military Tribunal at Nuremberg, in which Justice Jackson served as Chief Prosecutor for the United States. Justice Jackson and his staff amassed overwhelming documentary evidence proving that the dispossession of Jews was linked to the larger pattern of massive criminality comprehended under the terms, "genocide," "war crime," and "crime against humanity." This pattern of gross violation of the dignity, personhood and property of Austrian Jews serves as the matrix of understanding of the claim of immunity presented in this case.

In Section II amici urge that federal courts most emphatically have plenary jurisdiction over the crime of genocide and its fruits, and that no nation enjoys sovereign immunity from this crime, any more than it would from acts of piracy, terrorism, or engaging in slavery. The taking of property on the basis of religion and race renders inapplicable any reliance upon the Act of State doctrine. The discussion about whether Austria was a "hostile nation" during World War II is a red herring. The real issue is whether petitioners may now invoke sovereign immunity about retention of looted art that is the fruit of a vast conspiracy to murder.

In Section III amici present a brief chronology of critical developments in international law and in the history of Europe, and more particularly in the history of Austria, that may be useful for the Court as it assesses the jurisdictional defense improperly relied upon by the petitioners.

In Section IV amici offer important jurisprudential considerations that support affirming the decision below. First, the Court should avoid exalting legal formalism in a manner that would enable any country to profit from avoiding its responsibility of returning Nazi-looted art to

those from whom it was stolen or to their sole surviving heirs. To do so would send a curiously weak message to Austria and other nations about the correlative duties – now formally acknowledged by Austria, 43 other nations, and by the art community throughout the world – to search carefully for evidence of Nazi-looted art and to restore such art promptly to its rightful owners. Second, far from interfering with the foreign policy of the United States, allowing federal courts to serve as fora for redress of serious crimes arising from the Holocaust era enables such claims to be resolved judiciously and in conformity with the rule of law and the fundamental freedoms championed by this country when it undertook its titanic struggle in World War II against Fascism. Third, the Court should enable the world to continue to remember the darkest moment of the twentieth century, the Shoah, so as to avoid its repetition to anyone, anywhere.

ARGUMENT

I. Jurisdiction over Restitution of Nazi-Looted Art Should Be Evaluated within the Broad Context of the Nazi Atrocities and of the Extortion and Deception Practiced by the Austrian Government after World War II

A. Historical Misstatements and Lacunae in the Statement of the Case

Maria V. Altmann, a Jew of Vienna, survived the Shoah by leaving everything behind in 1938, the year of the *Anschluss* or annexation of Austria into "Greater Germany" and of the Kristallnacht or night of broken glass when the Nazis raided and burned synagogues all over Germany and Austria, removing any lingering doubt in the mind of most Jews that there was no safety for them in the Third Reich. After her husband was released from Dachau, Maria Altmann fled with him to England. Four years later they emigrated to this country, and in 1945 she became an American citizen. On August 22, 2000, she

commenced this civil action seeking restitution or replevin of six paintings by Gustav Klimt held by the Austrian Gallery.

Petitioners, the Republic of Austria and its instrumentality, the Austrian Gallery in Vienna, paint a rosy picture of the state of the record in this case, confidently asserting both in the Petition and their opening brief that the paintings are "owned by the Republic." Pet. 3, Br. Pet. 5. This misleading statement ignores the very heart of this litigation – that these six paintings are in fact "owned by Maria V. Altmann, but in the wrongful possession of the Republic of Austria and the Austrian Gallery." Complaint, J. App. 152a.

Austria asserts several reasons for the legal validity of its ongoing possession of the disputed paintings. Upon close scrutiny, none of these claims establishes a legally compelling reason against restitution of the art to Altmann.

Petitioners argue that the Court of Appeals "seriously misread the historical record." Br. Pet. 31-38. As trained historians, amici believe that the Court of Appeals got the core historical reality just right. In attacking the judges who rejected their claim of absolute immunity for Holocaust-era plunder, petitioners open the door to evaluation of their own historical reliability. Among the errors that crept into their statement of the case is the false claim that a provision in the 1923 will of Adele Bloch-Bauer had the effect of transferring the Klimt paintings to the Austrian Gallery. Br. Pet. 6. According to petitioners, Adele "provided in her will that six paintings by Gustav Klimt, which had hung in the Bloch-Bauer palais in Vienna until the time of her death [in 1925], should be given to the Austrian Gallery upon her husband's death." *Id.* Not quite. The relevant portion of the will reads: "I kindly ask my husband to bequeath my two portraits and four landscapes by Gustav Klimt after his death to the Austrian National Gallery in Vienna." An ancient maxim of Roman law states: "*Nemo dat quod non habet*. No one gives something

they don't have." This principle functions in the law of Austria and the United States. *See* Opp. 2 n. 1.

Petitioners make much of the delivery of a Klimt painting to the Austrian Gallery by Adele's widower, Ferdinand Bloch-Bauer, in 1936. They suggest that this fact demonstrates Austria's good faith in holding on to all of the disputed paintings. After all, they claim, didn't Ferdinand do precisely what Adele had hoped he would do in her 1923 will? But this is a red herring. The painting that Ferdinand brought to the Austrian Gallery is not involved in this litigation at all.

The critical piece of information on which the Court should focus is the date of the expropriation of the six disputed paintings, which occurred nearly a year *after* the Anschluss, March 12-13, 1938, when Nazi hegemony in Austria became complete. The disputed paintings were not given by Ferdinand to the Austrian Gallery in 1936. In 1938 Ferdinand fled Vienna for his life. He went first to Czechoslovakia. After England and France agreed at the Munich Conference that Hitler could occupy the Sudetenland, Ferdinand fled again, this time to Switzerland, leaving behind all his possessions. His castle in Prague became the headquarters of Reinhardt Heydrich, the key person in planning and executing the anti-Jewish policies of the Third Reich. In 1939 the Nazis raided Ferdinand's Vienna residence, and looted all of its contents, including the paintings at issue in this case. Dr. Erich Führer – the Nazi bureaucrat in charge of looted art, who passed paintings to Hitler and Göring in their private capacity as collectors of fine art, and who kept several treasures for himself – gave two of the disputed Klimts to the Austrian Gallery in 1941, and a third to the gallery in 1943.

Ferdinand Bloch-Bauer lived in penury in England. *See* Appendix B: letter to Oskar Kokoschka, April 2, 1941. He died in November 1945, leaving a will that revoked all prior wills and that bequeathed all his possessions to Maria Altmann, her brother, and her sister. J. App. 40a. Neither the 1923 will of Adele nor the 1945 will of Ferdinand may be

construed with any degree of plausibility as effectuating a transfer of property to Austria. As Mrs. Altmann notes, "What love could my uncle have for Austria after they robbed him of everything?. . . . This art was dragged out of the house by people who murdered their friends. Would Adele want the things she treasured left [in Austria] after that?" Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* 242 (2003).

Petitioners fail to mention the famous London Declaration of January 5, 1943, in which the Allies and all European governments-in-exile issued a formal warning of their intent "to defeat the methods of dispossession practiced by the Governments with which they are at war" and reserved all their rights "to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the [Nazi] occupation or control. . . ." Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control of 1943, 8 Dept. St. Bull. 1943 at 21. *See* Hector Feliciano, *Lost Museum* 224 (1997); and Lawrence Kaye, "Laws in Force at the Dawn of World War II: International Conventions and National Laws," in Elizabeth Simpson, ed., *The Spoils of War: World War II and its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property* 100-105 (1997); the text of the London Declaration is printed as an Appendix, *id.* at 287.

More curiously, petitioners failed to comment on the Nullity Act of 15 May 1946, in which Austria made all wartime "Aryanizations" of property null and void. J. App. 40a. For a discussion of Aryanization of property, *see* Avraham Barkai, "risierung," in Israel Gutman, ed., 1 *Encyclopedia of the Holocaust* 84-87 (1990).

Instead of acknowledging these facts, petitioners rely on a highly dubious 1948 transaction in which the Altmann family lawyer, Gustav Rinesch, agreed with Austrian officials to extinguish his clients' claims to the paintings in exchange for an export permit allowing the

family to have other items of property sent to them. As the District Court found, "It was the policy after the war to use the export license law to force Jews [living abroad] who sought export of artworks to trade artworks for export permits on other works." J. App. 76a. Extortionate deals such as this were unambiguously denounced as "indefensible" by Dr. Ernst Bacher, Chairman of Austria's Provenance Commission. *Washington Conference on Holocaust-Era Assets* 455 (1998), http://fcit.usf.edu/holocaust/resource/assets/heac4.pdf

Fifty years later a conflict erupted over the ownership of two paintings by the modernist Egon Schiele that had been stolen by the Nazis from Austrian Jews, and that were on loan from Austria to the Museum of Modern Art in New York. *See* Bazyler, *Holocaust Justice* 226-38. Like this case, the Schiele litigation is a Holocaust restitution case. Unlike this case, it was brought by the United States as a criminal matter seeking the civil remedy of forfeiture. *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000).

In the midst of this controversy, the Austrian government opened the Austrian Gallery's archives to researchers to confirm independently that Austria did not possess any other Nazi-looted art. Instead of confirming this point, an Austrian journalist, Hubertus Czernin, found important documents about the Klimt paintings that led to the filing of this case. First, the Austrian Gallery had always publicly claimed that it had acquired its showpiece *Adele Bloch-Bauer I,* as a donation from Ferdinand Bloch-Bauer in 1936. According to the archival records at the gallery, however, the "donation" was made in 1941, when Dr. Führer – the Nazi art liquidator – transferred this painting to the gallery, accompanied by a letter signed "Heil Hitler." Second, Czernin discovered postwar correspondence between Dr. Karl Garzarolli, then director of the Austrian Gallery, and his predecessor expressing concern that Adele's will did not legally transfer the paintings to the Austrian Gallery and that the gallery never obtained

"even during the Nazi era an incontestable declaration of gift in favor of the [Austrian] state from Ferdinand Bloch-Bauer." Bazyler, *Holocaust Justice* 243. Third, Czernin discovered and later provided to Maria Altmann details of the extortionate deal between Austria and the Altmann's lawyer in 1948, under which the three Klimt paintings that came to the Austrian Gallery during the war were allowed to stay there and the others could remain in Austria and later came to the Austrian Gallery. The discovery of a smoking gun at a crime scene is rare. The discovery of three smoking guns fired at different times is rarer still. The District Court made careful findings about all these facts. J. App. 77a-81a. So did Dr. Rudolf Welser, Chairman of the Institute of Civil Law, University of Vienna. *See* http://www.adele.at/Rechtsgutachen/rechtsgutachen.html (109 page legal opinion on whether Austria acquired a claim to or ownership of the paintings at issue in this case, and whether, pursuant to the Austrian law of restitution of artworks, 4 December 1998, authority exists to restitute these paintings without remuneration to the heirs of Ferdinand Bloch-Bauer).

Petitioners' claim that "Austria's ownership of the paintings derives from events that occurred before and after World War II, independent of Nazi atrocities," Br. Pet. 5, thus hangs on a very slender reed. In fact, it collapses under the well-settled rule that the facts alleged in a well-pleaded complaint, J. App. 151a-208a, must at this stage of the litigation be accepted as true. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980).

B. The Lexicon of Crime Was Reinvented in the Mid-Twentieth Century to Describe the Enormity of State-Sanctioned Moral Depravity

The term "grand larceny" used to signify the felonious taking of another's property of such value as to be punishable as major theft. The term "rape" used to define the most depraved violence of a man imposing himself by force upon a woman. The term "homicide" used to bear the full

weight of the most grievous offense in penal codes, the unjustified taking of a human life. The term "perjury" used to connote the most reprehensible distortion of language to deceive a fact-finder: deliberate lying intended to mislead the fact-finder.

None of these terms is adequate to describe the enormity of state-sanctioned moral depravity in the twentieth century. Property theft included land grabbing of massive proportions, and such widespread dispossession and homelessness as to become a major cause of death by the millions. From the Turkish abuse of Armenian women to the Serbian gang rape of Muslims in Bosnia, rape became the prelude to slaughter.

It has long been known that truth is the first casualty of war, but British lies about German soldiers eating Belgian babies during World War I pale into harmless distortions when compared to the propaganda and cover-up practiced by the Nazis in World War II. The perpetrators of plunder and murder routinely employed a rhetoric of bureaucratic double-speak that masked the foul reality of their deeds. Justice Jackson described "the Nazi habit of economizing in the use of truth" in his famous closing argument at the International Military Tribunal at Nuremberg: "Lying has always been a highly approved Nazi technique. . . . Nor is the lie direct the only means of falsehood. They all speak with a Nazi doubletalk with which to deceive the unwary. In the Nazi dictionary of sardonic euphemisms 'final solution' of the Jewish problem was a phrase which means extermination; 'special treatment' of prisoners of war meant killing; 'protective custody' meant concentration camps. . . . The record is full of other examples of dissimulations and evasions." Cited in Robert E. Conot, *Justice at Nuremberg* 472 (1983).

One of the most painful duties of historians of war is to undertake careful post mortem analysis. This duty is especially necessary in the case of World War II, the most devastating of all wars, in which over 50 million lives were lost, overwhelmingly civilians, 6 million of whom were

Jews. It is critical to the understanding of the enormity of this evil that massive thefts, mass murder, and lies and denials were closely inter-related. They were all cut from the same bolt of cloth. The one led to the other. The Nazi cover-ups and doubletalk reinforced their crimes even to the point of making these foul deeds seem to be the "perfect crime" that would in the perpetrators' self-deception go unpunished.

Sir Winston Churchill was familiar with loss of life in the Boer War in which he served, and at the disastrous World War I battle of Gallipoli in which he had the lead role as planner. As First Lord of the Admiralty, Churchill understood that war entails loss of life. But the mass murder he encountered in World War II on an unprecedented scale led this seasoned military commander and master of rhetoric almost speechless. He called the devastating killing of civilians in Poland and other parts of the eastern front of World War II "a crime without a name." Martin Gilbert, *The Holocaust: A History of the Jews of Europe in the Second World War* 186 (1985); *see also id.* at 485 ("systematic cruelties . . . amongst the most terrible events of history . . . vile crimes").

The crimes of the Nazi era required the invention of a new lexicon of crime. In 1944, Raphael Lemkin, a Jewish refugee from Poland teaching at Yale Law School, coined the term "genocide" because, he said, "New Conceptions require new terms." Lemkin, *Axis Rule in Occupied Europe* 79 (1944). He defined genocide as "the destruction of a nation or an ethnic group . . . a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves." Lemkin identified the objectives of such a plan as the "disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups." Lemkin noted: "Genocide is directed against the national group as an

entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group." *Id.* Thus the sole "crime" committed by the Jews of Austria was that they were Jewish. This "crime" triggered the looting of their property, the forced deportation to outside countries or to slave labor camps such as Mauthausen, and finally to the death camps in Poland.

Lemkin's neologism was rapidly accepted. In 1945, Justice Jackson and his colleagues in the prosecution at the International Military Tribunal at Nuremberg included a charge of genocide in the indictments of Hermann Göring, Rudolf Hess and others. The judges at this tribunal, however, ignored this count of the indictments, and proceeded with the counts that conformed to the precise language of the Treaty of London, in which the Nazi atrocities are described as "crimes against humanity."

After the Nuremberg trials, the United Nations General Assembly declared genocide an international crime and ordered the drafting of a treaty aimed at its prevention and punishment. The final text of the Genocide Convention was adopted at the 1948 General Assembly. Fifty years later, in 1998, it has been ratified by two-thirds of the member states, including the United States and Austria. Concerned with both prevention and punishment, the Genocide Convention provides a detailed definition of the crime of genocide: "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

For these reasons, we dare not trivialize Nazi plunder or leave its victims with abstract rights and no effective

remedies, for these thefts were an integral part of the plan to deport Jews, first out of Austria and then to death camps in Poland. Rabbi Emil Fackenheim once wrote that it is "forbidden to hand Hitler posthumous moral victories" he does not deserve. Fackenheim, "On Jewish Values," *Judaism* (March 1967). If so, then we must do what we can to repair the damaged fabric of humanity by addressing each dimension of the Nazi atrocities. We must still grieve the unspeakable loss of life and call it mass murder. We must redress the thefts whenever, as here, it is feasible to do so.

C. The Looting of the Altmann's Property Must Be Evaluated within the Specific Context of Austrian Antisemitism and the Significant Participation of Austrians in the Mass Murder of Jews during the Nazi Era

Although the Nazi atrocities extended to non-Jews as well as Jews, *see, e.g.,* Michael Berenbaum, *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (1990), the particular details of this case – plundering the property of a prominent Jewish family of Vienna – require focus on Austrian complicity in the massive injuries sustained by the Jews of Austria before, during, and after World War II.

One of the leading scholars of this period of Austrian history describes the events following the Anschluss as "a major outburst of plundering and brutality perpetrated against the Jews. Only rarely were these acts committed by German Nazis, and still less often by German soldiers; rather it was the Austrian Nazis and even non-Nazis who now released the hatred against the Jews that they had repressed, especially since the outlawing of the Nazi Party in 1933." Bruce F. Pauley, "Austria," in David S. Wyman, ed., *The World Reacts to the Holocaust* (1996) (describing invasion of thousands of Jewish homes, pulling people out of their beds and stealing their money and jewelry, ordering Jewish women to dress in their best clothes and scrub

pro-independence slogans off sidewalks with their bare hands or with toothbrushes; forcing Jewish children to write the insulting word *Jud* on the windows of their fathers' shops, pulling Orthodox Jews around by their beards; compelling Jews to lie down at the Praterstern and eat grass).

One of the most infamous of the Austrian Nazis, Adolf Eichmann, operated the Central Office for Jewish Emigration in Vienna out of the Rothschild palace, which the Nazis had confiscated. "By systematic bureaucratic methods the Jews emigrating from the country were automatically divested of all their assets. Most of the financing of the emigration was funded by the levy that every emigrant had to pay, in proportion to the assets that he declared." Herbert Rosenkranz, "Austria," in Israel Gutman, ed., 1 *Encyclopedia of the Holocaust* 129 (1990).

Justice Jackson's staff at Nuremberg amassed overwhelming documentary evidence establishing the link between dispossession of Jews and the larger pattern of massive criminality comprehended under the terms, "genocide," "war crime," and "crime against humanity." For example, shortly after the Anschluss Arthur Seyss-Inquart – the Austrian Quisling – acted immediately upon an order from Hermann Göring to institute antisemitic measures. "The process of isolation and abuse [of Jews] had been a gradual one in Germany. More than two months had passed between Hitler coming to power [in January of 1933] and the April boycott. Two and a half years had intervened between the April boycott and the Nuremberg Laws. But for the Jews of Vienna, the torments and the discrimination were immediate." Martin Gilbert, *The Holocaust* 59-61 (1985) (describing deprivation of all civil rights, similar episodes of violence against Jews in Vienna, including looting of shops, the breaking of heads, the tormenting of passers-by).

Kristallnacht or "Night of Broken Glass" (November 9-10, 1938) was the name given to a night not of occasional hooliganism, but of massive systematic violence against

Jews throughout Germany and Austria. Hundreds of synagogues were desecrated or burned. So were thousands of Jewish businesses, all of which were Aryanized after this night. After these pogroms in Austria,

> Eichmann imprisoned Jews in concentration camps as a means of extorting money from them and forcing them to speed up their emigration. When such a detainee was released, he was given a time limit in which to make his emigration arrangements; if he was still there after the limit had passed, he was again imprisoned. As a result there were a growing number of instances when adults or heads of families emigrated and left behind elderly parents and children. The number of old and infirm persons who had no relatives to care for them grew to 25,000 and there was a comparative rise in the number of abandoned children.

Herbert Rosenkrantz, "Austria," in Gutman, ed., 1 *Encyclopedia of the Holocaust* 129-130.

At Nuremberg, Justice Jackson's associate Lt. Henry K. Atherton described the "efficiency" of the "wholesale larceny" practiced by the Austrian Nazis against the Jews of Austria. Shortly after Kristallnacht, at a meeting in Berlin on November 12, 1938, Seyss-Inquart stated to Hermann Göring:

> "Your Excellency: In this matter we have already a very complete plan for Austria. There are 12,000 Jewish artisans and 5,000 Jewish retail shops in Vienna. Before the seizure of power we had already a definite plan for tradesmen, regarding this total of 17,000 stores. Of the shops of the 12,000 artisans about 10,000 were to be closed definitely and 2,000 were to be kept open; 4,000 of the 5,000 retail stores should be closed and 1,000 should be kept open, that is, Aryanized. According to this plan, between 3,000 and 3,500 of the total of 17,000 stores would be kept open, all others closed. This was decided following

investigations in every single branch and according to local needs, in agreement with all competent authorities, and is ready for publication as soon as we receive the law which we requested in September. This law shall empower us to withdraw licenses from artisans quite independent of the Jewish question." Göring said: "I shall have this decree issued today." Fischbök [a member of the Seyss-Inquart's official family] says [to Göring]: "Out of 17,000 stores 12,000 or 14,000 would be closed and the remainder Aryanized or handed over to the Bureau of Trustees which is operated by the State." And Göring replies: "I have to say that this proposal is grand. This way the whole affair would be wound up in Vienna, one of the Jewish capitals, so to speak, by Christmas or by the end of the year." The Defendant Funk then says: "We can do the same thing over here." In other words, Seyss-Inquart's so-called solution was so highly regarded that it was considered a model for the rest of the Reich.

3 *Trial of the Major War Criminals Before the International Military Tribunal* 342-343 (Nuremberg, 1947).

Professor Pauley writes: "Austrians were involved not only in planning and administering the deportations but also in operating the death camps. By far the best known of these Austrians was Adolf Eichmann, who in October 1939 was put in charge of Jewish deportation for the entire Reich. Austrians made up 80 percent of Eichmann's staff. Three-fourths of the commandants and 40 percent of the staff who actually operated the death camps were also Austrians. Odilo Globocnik, who had joined the Austrian Nazi Party in 1920 and who became the gauleiter of Vienna for a time shortly after the Anschluss, exercised supervision over Treblinka, Sobibor, and Belzec, three concentration camps whose only purpose was to kill Jews as expeditiously as possible and where, in fact, two million Jews were murdered. The commandant at Treblinka, the largest of these three camps, was likewise an Austrian,

Franz Stangl. The concentration camp of Mauthausen, near Linz, which by early 1945 had more than 84,000 inmates in forty-nine satellite camps, was by far the harshest of all the camps inside the prewar territory of the Third Reich. The prisoners were worked to death in quarries within a few months. . . . Simon Wiesenthal, the internationally renowned hunter of Nazi war criminals, has estimated that Austrians were directly or indirectly responsible for the deaths of three million Jews during the Holocaust. Austrians also made up 13-14 percent of the SS, even though they made up only about 8 percent of the population of the Greater German Reich." *Id.* at 491.

As the extortionate deal entered into between Austria and the Altmann's attorney in 1948 illustrates, the mistreatment of Jews by Austria continued after the war. Another way of resolving the question presented is that the Federal Sovereign Immunity Act [FSIA] works no impermissible retroactive effect upon Austria in the circumstances of this case since the ongoing deception about the extortion was only disclosed to Maria Altmann in 1999, whereupon she promptly sought restitution. This view of the facts dissolves the focus on the magic moment in time when the FSIA conferred jurisdiction upon federal courts over expropriation claims lodged against foreign states.

II. Federal Courts Have Plenary Jurisdiction over the Crime of Genocide and its Fruits

Amici support the legal analysis of the jurisdictional question in the brief submitted by the respondent. We continue to focus our contribution on legal history. In this manner we hope to offer the Court guidance that comes from a discipline that the Court has itself employed from time to time in its opinions.

If a slave ship ran aground in Connecticut, could a foreign state be allowed to assert its sovereign property interest in slaves and demand the return of the slaves? This Court rejected Spain's claim to that effect in *The*

Amistad, 40 U.S. 518 (1841). Justice Story ruled that the Africans on board *The Amistad* were free individuals. Kidnapped and transported illegally, they had never been slaves. Although there is no close analogy between the mistreatment of slaves as "chattels personal" and the wrongful possession of a piece of art, the Nazis' dispossession of Jews was linked to their mistreatment of Jews in slave labor camps such as Mauthausen and to their murder of Jews by the millions in the death camps. The "slaves" who rose up in protest against their bondage on *The Amistad* were not really slaves, this Court taught. So also the "property" that Austria claims as its national treasure was never within its proper dominion, and after proper procedure on remand should be set free from Vienna and restored to Maria Altmann.

A country may not invoke sovereign immunity if it had obtained property that is the fruit of piracy, for customary international law has outlawed piracy and the remedy of forfeiture would apply to such booty. So also, the remedy of forfeiture has been applied to Austria's ongoing possession of Nazi-looted art without the sovereign immunity defense being of much avail. *See, e.g., United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000). The only significant difference between piracy and Nazi plunder is that the one made transportation and commerce by sea more perilous than it should be, and Nazi looting and its correlative polices made the entire land mass of Europe unsafe for millions.

This Court should no more allow any nation to take advantage of Nazi-looted art than it would allow a foreign nation to enjoy the fruits of slavery or piracy. Federal courts most emphatically have plenary jurisdiction over the crime of genocide and its fruits. No nation enjoys sovereign immunity from this crime, any more than it would from acts of piracy, terrorism, or engaging in slavery.

The Genocide Convention contains two provisions that shed light upon the interpretation the FSIA in the case now before the Court. First, far from preserving a theory

of absolute sovereign immunity, the Convention renders this defense completely unavailable. In the immediate aftermath of World War II, individual defendants who were accused of war crimes were not allowed to rely exclusively upon a defense of superior orders, nor was the defense of sovereign immunity entertained with any seriousness. There is no such defense to war crimes or crimes against humanity. And the Treaty of London that defined those crimes in establishing the charter of the International Military Tribunal at Nuremberg had no impermissible retroactive effect, for the treaty merely codified the long-established moral and legal principles governing the use of force already reflected in numerous treaties and in customary international law. Second, the Convention obliges states to extradite genocide suspects to a tribunal with jurisdiction to hear a case arising under the Convention. Sovereign immunity is no defense under these circumstances.

The Court of Appeals rejected petitioners' view that the application of section 1605(a)(3) of the FSIA would work an impermissible deprivation of their settled expectations to sovereign immunity. In effect, the Court of Appeals ruled that the crime of genocide is such an enormous violation of the basic building blocks of international law that no court ought to erect needless barriers to litigation of claims relating to this crime. For the reasons set forth in section I, amici urge that this view is correct.

III. Austria's Claim to Absolute Sovereign Immunity Must Be Evaluated with the Matrix of Critical Historical Developments in the Twentieth Century

A. Treaty Obligations as a Limit Upon Sovereign Immunity

The rise of complex multilateral covenants and treaties corresponds to the historical demise of the theory of absolute sovereign immunity. Any nation that enters into a

treaty limits *its* sovereignty by that very act. *See, e.g.*, Austrian Const. Art. 9(1) (generally recognized rules of international law regarded as integral parts of federal law). Justice Jackson's colleague at Nuremberg, Sir Hartley Shawcross, Chief Prosecutor for the United Kingdom, put it this way: "In the international field the source of law is not the command of a sovereign but the treaty agreement binding upon every state which has adhered to it. . . . [A]s M. Litvinov once said: 'Absolute sovereignty and entire liberty of action belong to such states as have not undertaken international obligations. Immediately a state accepts international obligations it limits its sovereignty.'" 3 *Trial of the Major War Criminals before the International Military Tribunal* 103 (1947).

B. The Claim of Austria to an Expectation of Absolute Sovereign Immunity is Negated by International Covenants to which Austria is a Party, by Austria's Theory and Practice Relating to Sovereign Immunity, by the State Treaty of 1955 under which it Reentered the Family of Nations in 1955, and by Recent Legislation

The United States suggests in its amicus brief that the jurisdictional point turns on whether Austria was a "hostile nation" during World War II. This is a red herring. Amici understand that Austria was illegally annexed to Germany in violation of the Treaty of St. Germain, the 1919 peace accord that divided up the old Austro-Hungarian Empire. And we understand that in an effort to warn Austrians to stop their bad behavior against Jews, the Allied Powers in 1943 issued the Moscow Declaration characterizing Austria as the first victim of Nazi aggression. But whether or not Austria existed as a "friendly" or "hostile" nation-state during the time of the Nazi pillage and plunder of Jewish property is entirely irrelevant to the consideration that no nation may legitimately profit from such plunder either by deceiving the owners of the

art about critical information, or simply by redefining the booty as part of its "national cultural heritage."

The United States suggests that the Tate Letter of 1952[2] provides a magic date for determining when the United States shifted away from absolute sovereign immunity. It does not. As the respondent demonstrates, Br. Res. 17-23, the law of limited sovereign immunity was the law of this land from the Marshall Court on. Thus the modern period merely reflects and reclaims a very old tradition in American legal history.

Within the modern period the most critical *dates* to identify are: *1939*, when the Nazis raided the Bloch-Bauer home and stole the paintings, and *1941*, when the Nazi art liquidator Dr Führer "donated" the disputed paintings to the Austrian Gallery. Both of those dates are in the period of Nazi occupation and domination of Austria. And the critical *fact* to identify in both of those events is that the subjects engaged in the unlawful taking and unlawful "giving" were the Nazis, found at Nuremberg to have looted and plundered as part of a massive conspiracy to murder. In short, the government's brief proves much too little by failing to focus on who did what, when and to whom.

Petitioners also fail to account for five crucial facts within Austrian history. First, Austria, as the successor nation-state to the Austro-Hungarian Empire, limited its

---

[2] There are at least three other dates before 1952 when the Executive Branch moved away from the view that sovereign immunity is absolute: (1) 1943, when the United States joined the other Allies in the London Declaration, *supra* (denouncing dispossession), (2) 1948, when the Department of State announced that it was reconsidering its view of sovereign immunity, J. App. 49a, and (3) April 27, 1949, when State issued an announcement denouncing discriminatory dispossession by the Nazis and relieving "American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." J. App. 52a (emphasis added).

sovereignty when it ratified the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910). Article 46 forbids the confiscation of private property, Article 47 forbids pillage, and Article 56 specifically forbids "[a]ll seizure of . . . works of art."

Second, as the Court of Appeals found, Austria had already moved away from a general theory of absolute sovereign immunity in the 1920s, Pet. App. 20a. *See also Dralle v. Republic of Czechoslovakia*, 17 I.L.R. 155, 163 (Supreme Court of Austria 1950) (foreign state may not avoid responsibility for violations of international law by invoking sovereign immunity).

Third, in conformity with the spirit of the London Declaration of 1943 (repudiating dispossession), Austria's Second Republic officially repudiated all transactions in the property of Nazi victims, declaring them null and void. Nullity Act of 15 May 1946. J. App. 40a. Soon thereafter, Austria enacted on July 26, 1946 and February 6, 1947 three statutes designed to accomplish restitution of Nazi-looted property. *See* J. App. 214a-215a.

Fourth, when Austria sought to rejoin the family of nations as an independent nation, it pledged to restitute all unreturned Nazi-looted property. 1955 State Treaty, Art. 26, ¶ 1, cited in Opp. App. C, TIAS 3298, 6 U.S.T. 2369 (May 15, 1935).

Fifth, after intense negotiations, the Clinton administration convened a major international conference in Washington in December 1998.[3] At this conference Austria announced that it would enact federal legislation to

[3] *See* www.state.gov/www.regions/eur/981203_heac_art_princ.html (text of Washington principles agreed to by 44 nations, including Austria); *see also* Geri Yonover, "The Return of Nazi-Looted Art: Choice of Law Issues," in John K. Roth, ed., 2 *Remembering for the Future: The Holocaust in the Age of Genocides* 952 (2001).

enforce the duty of restitution of Nazi-looted art, and it described to the other 43 nations at the conference its laudable efforts to catalog confiscated art in its state museums and to return them to their rightful owners. Austria enacted this legislation on December 4, 1998, the day after the end of the Washington Conference. And Austria has settled a major dispute with the Rothschild family, restoring to them more than 250 treasures that the Nazis had looted and that Austria had retained as part of its "national cultural heritage" for decades.

All of these considerations should lead this Court to the conclusion that Austria may not now be heard to claim absolute sovereign immunity in a case seeking replevin of Nazi-looted art that is the fruit of a vast conspiracy to murder.

IV. Jurisprudential Reasons for Affirming the Court of Appeals

A. This Court Should not Employ Formalistic Legal Reasoning that Masks the Worst Crime of the Twentieth Century

This Court should avoid exalting legal formalism in a manner that would enable any country to profit from avoiding its responsibility to return Nazi-looted art to those from whom it was stolen or to their sole surviving heirs. To do so would send a curiously mixed signal to Austria and other nations about the correlative duties – now widely acknowledged in the art world – to search carefully for evidence of Nazi-looted art and to return it promptly to its rightful owners.[4] In the past decade,

[4] *See* American Association of Museum Directors, *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945)* (guidelines on searching provenance of art during 1933-1945 and making restitution to rightful owners) www.aamd.org/guideln.shtml; *see also* Geri Yonover, "The Return of Nazi-Looted Art,"

(Continued on following page)

moreover, this country redoubled efforts to encourage honoring the moral duty of restitution of stolen property. Those negotiations over the compensation for looted assets in Swiss banks, for looted art such as the paintings at issue in this case, and for some sense of the value of slave labor, and litigation such as the instant case, are all part and parcel of the "government statements, documents, and actions expressing the United States' strong condemnation of Nazi atrocities." Br. of United States as Amicus Curiae, 28. This is not, of course, a partisan point, but an observation that can be made of every administration from President Roosevelt's to the present.

The behavior of Austrians toward their Jewish neighbors immediately after the Anschluss, during World War II, and after the war, is a reprehensible chapter in Austrian history. Austria has made major steps toward acknowledging responsibility for this disgraceful period. For example, in 1998 it enacted legislation that promised to return art that came into Austrian possession because of the Nazi period. This case can be a win-win. By affirming the

---

note 3 *supra*, 960, n. 4. The organizer of the Washington Conference, Ambassador Stuart Eizenstat, describes the dramatic results of these principles: "major art museums in this country and throughout the world are spending money and allocating staff to research provenance to detect whether paintings have been looted. Thousands of pieces of art have been listed on Web sites." Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* 343-344 (2003). For example, the *Central Registry of Information on Looted Cultural Property 1933-1945*, http://www.lootedart.com/, aims "to advance knowledge of the cultural spoliation of Europe by the Nazi regime." The site contains two databases, the Information and Object Databases, with the goal of documenting "the fate of families, works of art and institutions" during the Nazi era. Because of this information system, hundreds of objects of art are now being returned to their rightful owners.

Court of Appeals, this Court can allow an elderly citizen unimpeded access to the only forum in which at this stage of her life she can afford to pursue any meaningful relief. And in the same moment, this Court can provide Austria with an opportunity to continue in the direction it endorsed in the statutes of 1946 that nullified the Nazi transactions, in the State Treaty of 1955 announcing to the world that it would restore Nazi-looted artworks to their rightful owners, and in the recent federal legislation of 1998 publicly endorsing the "Washington Principles."

For the Court to announce that no foreign government need ever be accountable in a federal court for returning Nazi-looted property is akin to contradicting the declared foreign policy of this country since at least 1943, when we joined the London Declaration. We put this policy into practice in 1945 as soon as our GIs began stumbling upon enormous treasures of art that the Nazis had looted – primarily from Jewish art collectors before they were deported to death camps – and secreted for placement in a grand art museum that they planned to erect in Hitler's home town, Linz, Austria. *See* the reports by the director of the Art Looting Unit of the O.S.S., James S. Plaut, "Loot for the Master Race," *Atlantic Monthly* (Sept. 1946) and "Hitler's Capital," *id.* (Oct. 1946) (Nazi art theft in occupied Europe "the most extensive and highly organized series of thefts devised by a nation in modern times").

To grant the relief sought by the petitioners is akin to sending the world a double message along the following lines: "Please return stolen art to its rightful owners. But if you like this art a lot, or if you find it to be 'art of national significance,' Br. Pet. 5, or if keeping this art will help attract tourists to your capital, by all means keep it, and we'll find a way of making sure that no one can use our courts to establish whether it belongs to you or not."

B. Affirming the Court of Appeals Would Have no Negative Impact on Foreign Relations

In its amicus brief the United States urges the Court not to interfere with the exclusive domain of the executive branch over foreign policy. There are several things wrong with this view.

First, the Executive Branch has a very vital role to play in the execution of foreign policy, but by no means exclusive control over this dimension of public life. James Madison, the father of the Constitution, was famously opposed to concentration of powers in the new republic, and accordingly devised a model of separate powers with checks and balances among the three branches of government. *See The Federalist* Nos. 10, 51. Hence it is unsurprising that Madison assigned important powers over foreign policy to Congress, Art. I, § 8 (power to regulate commerce with foreign nations, power to declare war, power of the Senate to confirm Ambassadors) and to the Judiciary, Art. III, § 2 (judicial power extended to all cases arising under treaties, affecting ambassadors, and to controversies between a state or its citizens and foreign states).

Second, this Court need not fear that it will adversely affect the Nation's foreign relations by carrying out its constitutional mission of adjudicating cases and controversies which entail construction of statutes such as the FSIA within the broad context of the Nation's history.

Third, far from interfering with the foreign policy of the United States, construing the FSIA to allow use of the federal courts to redress grievances arising from the Holocaust era enables those claims to be resolved judiciously and in conformity with the rule of law that was espoused by this country when it undertook its titanic struggle in World War II against Fascism.

Fourth, comity among nation-states – the basic purpose of sovereign immunity – will not be injured by affirming in this case, for there no longer exist any Nazi regimes, or any regime entitled to comity under circumstances of this case.

The incidental state beneficiaries of Nazi war crimes have an interest too dubious to sustain or justify absolute sovereign immunity.

C. Affirming the Court of Appeals is an Honorable Way of Bearing the Burden of Memory of the Shoah

Holocaust revisionism is a lamentable phenomenon that can no longer be ignored. Once dismissed as a lunatic fringe, Holocaust-deniers have been growing in numbers and influence during the past 25 years, and now sprout websites on a weekly basis. *See, e.g.*, Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (1994) (providing numerous examples of attempts to prove that the extermination of six million Jews is a hoax; that only a few thousand Jews died in the camps from disease; that the Allied bombings of German cities were worse than any Nazi offense; and that the "true victims" of World War II were the German or the Austrian people).

Amici do not suggest that by raising the defense of absolute sovereign immunity in the circumstances of this case, Austria is indulging in Holocaust denial. We do, however, insist that in construing the FSIA here, the Court may not escape the duty of remembering the raid on the Bloch-Bauer home in 1939 and the major thefts that occurred that day and the weightier matters of the Nazi war against the Jews. It is true, as the Moscow Declaration asserted, that Austria was the first victim of Nazi aggression. But that is a half-truth that should not distract the Court's attention from another very painful truth: that thousands of Austrians perpetrated countless acts of depravity and brutality upon the Jews of Austria. The Court should not be distracted from the urgent task at hand: to provide an effective remedy to an elderly survivor of the Shoah who deserves to have her family's things restored to her before she dies.

Sir Hartley Shawcross, Chief Prosecutor for the United Kingdom at Nuremberg, observed: "Human memory is very short. Apologists for defeated nations are sometimes able to play upon the sympathy and magnanimity of their victors, so that the true facts, never authoritatively recorded, become obscured and forgotten." 3 *Trial of the Major War Criminals before the International Military Tribunal* 91 (1947). The IMT produced a voluminous record of the true facts of the Nazi atrocities, lest these facts become obscured and forgotten. It is far too soon after these events for this Court or any agency of the United States to obscure or forget these facts.

No one has stated more powerfully the duty to bear the burden of this memory than the Nobel Peace laureate Elie Wiesel, who wrote at the end of *Night*:

> Never shall I forget that night, the first night in camp, which has turned my life into one long night, seven times cursed and seven times sealed. Never shall I forget that smoke. Never shall I forget the little faces of the children, whose bodies I saw turned into wreaths of smoke beneath a silent blue sky. Never shall I forget those flames which consumed my faith forever. Never shall I forget that nocturnal silence which deprived me, for all eternity, of the desire to live. Never shall I forget those moments which murdered my God and my soul and turned my dreams to dust. Never shall I forget these things, even if I am condemned to live as long as God Himself. Never.

One who has lived through the experiences of the death camps and witnessed the murder of a parent or other family member can never forget these realities. Those who did not live through these realities have only the memory of another's memory, and this secondary memory may fade over time. Precisely in order to avoid the premature diminution of the memory of the Shoah by the general public, however, this nation has erected holocaust museums in our capital and in many of our states.

It is much too soon in the history of the world to elide the reasons why the American people, including several members of this Court, went to war against the Nazis, or to forget what General Eisenhower learned when he visited the camps liberated by the Allies and saw emaciated walking skeletons. These reasons included respect for private property and freedom from invidious discrimination on the basis of race and religion. This Court has for the most part played an important role after the war in the struggle to achieve these values within our own society. *See, e.g., Brown v. Bd. of Education*, 347 U.S. 483 (1954) (racial discrimination violates the Fourteenth Amendment); *Church of the Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (religious discrimination violates the First Amendment applied to the States). At this critical moment in history this Court should not send to foreign states the message that they may trample upon these values without ever worrying about being held accountable in our federal courts for benefiting from racial and religious discrimination.

This is a civil action to remove the very dark cloud that now hangs over six paintings that Austria claims as a national treasure, but that Maria Altmann views as the last remaining family possessions that were stolen by the Nazis. Fortunately, the moment has long since passed when Austria hides behind the half-truth that it was a victim of Nazi aggression. It has for many years been engaged in constructive efforts to confront and learn from the sad truth that Austrians – including Adolf Hitler, Adolf Eichmann, Arthur Seyss-Inquart, Odilo Globocnik, and Franz Stangl – led and carried out systematic murder of the Jews of Europe. We realize that the current government of Austria is emphatically not Nazi. Indeed, we acknowledged repeatedly above that the current government of Austria has made important strides in redressing the wrongs that arose in the Nazi period, including the looting of art. All that amici now urge is that Austria be required to go forward in an American court on the merits of its claim of good title to the disputed art. Or in the alternative, it can simply restore the paintings to their

rightful owner and go about all of its other business with no interference whatever with its sovereignty.

By allowing this case to proceed on the merits, this Court would fulfill a moral obligation described by one of the most vivid witnesses to the Shoah: "The duty to remember covers not only big accounts, huge palaces, and rare art collections but also less wealthy families, small merchants, cobblers, peddlers, school teachers, water carriers, beggars; the enemy deprived them of their pathetically poor possession, such as a prayer book, a shirt, a comb, eyeglasses, toys. In other words: the poor victims were robbed of their poverty." Elie Wiesel, "Foreword," Stuart Eizenstat, *Imperfect Justice* xi (2003). As painful as the burden of this memory may be, we dare not forget.

CONCLUSION

For the reasons stated above and in the brief for respondent, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

EDWARD MCGLYNN GAFFNEY, JR. *
VALPARAISO UNIVERSITY SCHOOL OF LAW
656 S. Greenwich Street
Valparaiso, IN 46383
219-465-7860
* *Counsel of Record*

ARTHUR MILLER
AREEDA HALL
1545 Massachusetts Ave.
Cambridge, MA 02138
617-495-4111

MELVYN WEISS, ESQ.
MILBERG WEISS BERSHAD HYNES & LERACH, LLP
One Pennsylvania Plaza
New York, NY 10119-0165
212-594-5300

APPENDIX A

Statements of Interests of Particular Amici

Michael Berenbaum served as project director of the U.S. Holocaust Memorial Museum. He is a Holocaust Scholar whose writings include *A Promise to Remember: The Holocaust in the Words and Voices of Its Survivors* (2003); *The World Must Know: The History of the Holocaust Told in the U.S. Holocaust Memorial Museum* (1993); and *The Vision of the Void: Theological Reflections on the Works of Elie Wiesel* (1979). He edited *Witness to the Holocaust* (1997) and *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (1990). With Michael J. Neufeld he co-edited *The Bombing of Auschwitz: Should the Allies Have Attempted It?* (2000). With Abraham J. Peck, he co-edited *The Holocaust and History: The Known, the Unknown, the Disputed, and the Reexamined* (1998). With Betty Rogers Rubenstein he co-edited *What Kind of God?: Essays in Honor of Richard L. Rubenstein* (1995). With Yisrael Gutman he co-edited *Anatomy of the Auschwitz Death Camp* (1994). With John K. Roth he co-edited *Holocaust: Religious and Philosophical Implications* (1989). He is also the executive producer of "Desperate Hours" (2001), a documentary film about the Shoah in Turkey.

Judy Chicago and Donald Woodman are artists. They are the co-authors of *The Holocaust Project: From Darkness to Light* (1993), an account of their journey to several concentration camps and death camps in Europe, and the photography and painting that ensued from this journey. The volume includes a study of the suffering, including torture and death, inflicted upon prisoners detained at the slave labor camps around Mauthausen, Austria.

Hedy Epstein is a survivor of the Shoah who left her home in Kippenheim, Germany in 1939 at the age of 14 as part of the Kindertransport to England. Her story is narrated in the film "Into the Arms of Strangers: Stories of the Kindertransport" (2000) and in the companion volume of the same title. She lives in St. Louis, and for decades she has been engaged in human rights and social justice issues, especially in fair housing in the Greater St. Louis Area. She has also been involved for decades in Holocaust education at all levels.

Hector Feliciano is an art historian and the author of *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* (1998).

Peter Harclerode is an author. Brendan Pittaway has been a journalist with BBC TV and is currently a communications consultant in Manchester, England. They co-authored *The Lost Masters: World War II and the Looting of Europe's Treasure Houses* (2000).

Deborah E. Lipstadt is the director of the Rabbi Donald A. Tam Institute for Jewish Studies and the Dorot Professor of Modern Jewish and Holocaust Studies at Emory University. She is the author of *Denying the Holocaust: The Growing Assault Upon Truth and Memory* (1993); *Beyond Belief: The American Press and the Coming of the Holocaust, 1933-1945* (1987).

Franklin H. Littell is Distinguished Professor of Holocaust and Genocide Studies at the Richard Stockton College of New Jersey and Professor Emeritus of Religion at Temple University. He has written or edited 30 books and over 500 scholarly articles on Religious Liberty, Jewish Christian Relations, The Holocaust and Genocide which include *American Protestantism and Antisemitism*

(1985) and *The Crucifixion of the Jews* (1975). *The German Church Struggle and the Holocaust,* co-edited with Hubert G. Locke (1974), *Hyping the Holocaust* (1997), Historical Atlas of Christianity (2001), *A Christian Response to the Holocaust: Selected Addresses and Papers 1952-2002.* (2003). He is the co-founder of The Scholars' Conference on the Holocaust and the Churches, an annual meeting that draws scholars from all over the world to explore the ongoing significance of the Shoah.

Marcia Sachs Littell is Professor of Holocaust and Genocide Studies and Director of the Master of Arts Program in Holocaust and Genocide Studies at the Richard Stockton College of New Jersey. Her publications include *Liturgies on the Holocaust: An Interfaith Anthology* (1986); *Holocaust Education: A Resource Book for Teachers and Professional Leaders* (1985). *Confronting the Holocaust: A Mandate for the 21st Century. co-edited with Stephen Feinstein and Karen Schierman*(1998), *Women in the Holocaust: Responses, Insights, Perspectives (*2001); and *A Century of Genocide* co-edited with Daniel Curran and Richard Libowitz (2002). She is the senior research consultant to the Philadelphia Center on the Holocaust, Genocide and Human Rights.

Hubert G. Locke is professor emeritus at the University of Washington. He is the author of *Searching for God in Godforsaken Times and Places: Reflections on the Holocaust, Racism, and Death* (2003); *Learning from History: A Black Christian's Perspective on the Holocaust* (200[illegible]), *The Black Anti-Semitism Controversy: Protestant Views and Perspectives* (1994). He is the editor of *Exile in the Fatherland: Martin Niemöller's Letters from Moabit Prison* (1986); *The Barmen Confession: Papers from the Seattle Assembly* (1986), and *The Church Confronts the*

Nazis: Barmen Then and Now (1984). With Marcia Sachs Littell he co-edited *Holocaust and Church Struggle: Religion, Power, and the Politics of Resistance* (1996), and *Remembrance and Recollection: Essays on the Centennial year of Martin Niemöller and Reinhold Niebuhr, and the Fiftieth year of the Wannsee Conference* (1996). With Franklin H. Littell he co-edited *What Have we Learned?: Telling the Story and Teaching the Lessons of the Holocaust: Papers of the 20th Anniversary Scholar's Conference* (1993), and *The German Church Struggle and the Holocaust* (1974), and he is the co-founder of The Scholars' Conference on the Holocaust and the Churches.

Bruce F. Pauley is professor of history at the University of Central Florida. He is the author of *From Prejudice to Persecution: A History of Austrian Anti-Semitism* (1992) and *Hitler and the Forgotten Nazis: A History of Austrian National Socialism* (1981), and the chapter on Austria in David S. Wyman, ed., *The World Reacts to the Holocaust* (1996).

Carol Rittner, RSN, is Distinguished Professor of Holocaust and Genocide Studies at The Richard Stockton College of New Jersey. With John K. Roth she co-edited *Will Genocide ever End?* (2002); *Pope Pius XII and the Holocaust* (2002); *"Good News" after Auschwitz?: Christian Faith within a Post-Holocaust World* (2001); *From the Unthinkable to the Unavoidable: American Christian and Jewish Scholars Encounter the Holocaust* (1997); *Different Voices: Women and the Holocaust* (1993); and *Memory Offended: The Auschwitz Convent Controversy* (1991). She is the producer-director of the documentary film, "Courage to Care," and the editor of an accompanying volume *Courage to Care: Non-Jews Who Rescued Jews During the Holocaust* (1986).

John K. Roth is the Edward J. Sexton Professor of Philosophy and the Director of the Center for the Study of the Holocaust, Genocide, and Human Rights at Claremont McKenna College. He is the author of *Holocaust* Politics (2001) and *A Consuming Fire: Encounters with Elie Wiesel and the Holocaust* (1979). With Richard L. Rubenstein he is the co-author of *Approaches to Auschwitz: The Holocaust and its Legacy* (1987). With Michael Berenbaum he co-edited *Holocaust: Religious and Philosophical Implications* (1989). With Carol Rittner he co-edited *Will Genocide ever End?* (2002); *Pope Pius XII and the Holocaust* (2002); *"Good News" after Auschwitz?: Christian Faith within a Post-Holocaust World* (2001); *From the Unthinkable to the Unavoidable: American Christian and Jewish Scholars Encounter the Holocaust* (1997); *Different Voices: Women and the Holocaust* (1993); and *Memory Offended: The Auschwitz Convent Controversy* (1991). With Elisabeth Maxwell and Margot Levy, he co-edited *Remembering for the Future: The Holocaust in an Age of Genocide* (2001). He edits the Holocaust and Genocide Studies Series published by Paragon House.

APPENDIX B

Letter of Ferdinand Bloch-Bauer to Oskar Kokoschka, April 2, 1941

Dear friend and professor!

It pleasured me very much to hear from you after such a long time, especially that you are doing well and that you are still the brave fighter! I heard on the radio that Benes donated a picture of yours to the Tate Gallery! Nice!

In your position I would have gone to America and if it is still possible, go immediately! Europe will be a heap of ruins, perhaps the whole world; for art there will be no place here for decades! My people are in Canada in Vancouver, would like that I come, but I am already too old! I think about it, although I believe that I have missed the ferry.[1] For months there is no seat on a ship, not a clipper available! Your friend Dr. Ehrenstein was here with me yesterday. He obtained a visa for America, but how can he get over there?

In Vienna and Bohemia they took away *everything* from me. Not even a souvenir was left for me. *Perhaps* I will get the 2 portraits of my poor wife (Klimt) and my portrait. I should find out about that this week! Otherwise I am totally impoverished and probably will have to live very modestly for a few years, if you can call this vegetation living. At my age, alone, without any of my old attendants, it is often terrible. I have luckily a few good friends here in Geneva and Lausanne. Now I am already amortised,[1] will wait and find out, whether justice will still come, then I will gladly lay my hammer down!

What one hears from Vienna and Prague is terrible!

Now I wish you, from my heart, all the best and remain with heartfelt greetings

Your old dear true Ferdi.

Source: Sultano and Werkner, *Oskar Kokoschka.Kunst und Politik 1937-1950*, p. 124 (Vienna: Böhlau, 2003) (translated from German, emphasis in original).